IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1085 of 2018
Arising Out of PS. Case No.-52 Year-2015 Thana- SONBERSHA RAJ District- Saharsa

==========

Pushanjit Burman @ Prasenjit Burman @ Prasenjit Verma S/o late Sushil Burman resident of village/ mohalla - Gausani, P.S. Kuch Vihar, District Kuch
Vihar, West Bengal.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

==========

with

CRIMINAL APPEAL (DB) No. 90 of 2018
Arising Out of PS. Case No.-52 Year-2015 Thana- SONBERSHA RAJ District- Saharsa

==========

Pawan Yadav S/o Late Ram Bahadur Yadav, resident of Village- Manori, P.S.- Sonbarsa Raj, District- Saharsa.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

==========

Acts/Sections/Rules:

- *Sections 302, 120(B)/34 of the Indian Penal Code*

Cases referred:

- *Kamlakar Patil v. State of Maharashtra, reported in (2013) 6 SCC 417*
- *Raj Kumar @ Suman Vs. State (NCT of Delhi), rendered by Hon'ble Supreme Court in Cr. Appeal No. 1471 of 2023*
- *Maheshwar Tigga Vs. State of Jharkhand, reported in (2020) 10 SCC 108*

Appeal - filed against the judgement whereby the appellants have been convicted for committing the offences punishable under Sections 302, 120(B)/34 of the Indian Penal Code.

Held - Prosecution has projected informant as eye-witnesses, however, from his cross-examination, it is clear that he reached at the place of occurrence after 10-15 minutes and, therefore, he cannot be termed as an eye-witness. (Para 8)

Weapons were not produced before the Court nor the IO, before whom the confession was made by the accused, was examined by the prosecution. (Para 8.1)

Non-examination of the IO is not fatal to the prosecution's case when no prejudice is likely to be suffered by the accused. However, if the defence has suffered prejudice because of non-examination of the IO, it becomes fatal.

(Para 8.3)

In the present case, non-examination of the IO has caused prejudice to the defence. (Para 8.4)

Prosecution has also failed to prove the motive on the part of the accused to kill the deceased. (Para 8.5)

Court has not put the incriminating circumstances to the accused under Section 313, as a result of which prejudice has been caused to the appellants-accused. (Para 8.12)

Appeal is allowed. (Para 10)

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1085 of 2018

Arising Out of PS. Case No.-52 Year-2015 Thana- SONBERSHA RAJ District- Saharsa

==========

Pushanjit Burman @ Prasenjit Burman @ Prasenjit Verma S/o late Sushil Burman resident of village/ mohalla - Gausani, P.S. Kuch Vihar, District Kuch Vihar, West Bengal.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

==========

with

CRIMINAL APPEAL (DB) No. 90 of 2018

Arising Out of PS. Case No.-52 Year-2015 Thana- SONBERSHA RAJ District- Saharsa

==========

Pawan Yadav S/o Late Ram Bahadur Yadav, resident of Village- Manori, P.S.- Sonbarsa Raj, District- Saharsa.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

==========

Appearance :
(In CRIMINAL APPEAL (DB) No. 1085 of 2018)
For the Appellant : Mr. Amarnath Singh, Advocate
Mr. Kamal Kishore Singh, Advocate
Mr. Anil Kumar, Advocate
For the Respondent : Mr. Ajay Mishra, APP
(In CRIMINAL APPEAL (DB) No. 90 of 2018)
For the Appellant : Mr. Amarnath Singh, Advocate
Mr. Kamal Kishore Singh, Advocate
Mr. Anil Kumar, Advocate
For the Respondent : Mr. Sujit Kumar Singh, APP

==========

CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE DR. ANSHUMAN

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 08-01-2025

Both these appeals under Section 374(2) of the Code of Criminal Procedure arise out of common judgment of conviction dated 13.12.2017 and the order of sentence dated 03.01.2018 rendered by learned Additional Sessions Judge-II,

Saharsa in Sessions Trial No. 247 of 2015, arising out of Sonbarsa Raj P.S. Case No. 52 of 2015 (G.R. No. 940 of 2015), whereby both the appellants have been convicted for committing the offences punishable under Sections 302, 120(B)/34 of the Indian Penal Code (IPC) and they have been sentenced to suffer rigorous imprisonment for life and fine of Rs.5000/- each and, in default of payment of fine, they will have to undergo further rigorous imprisonment for six months each.

2. As both these appeals arise out of the common judgment and order, learned counsel for the parties requested that both the appeals be heard together as the evidence is common in both these appeals and accordingly we have taken up both the appeals together for final disposal.

3. Heard Mr. Amarnath Singh, learned counsel assisted by Mr. Kamal Kishore Singh and Mr. Anil Kumar, learned counsel for the appellants and Mr. Ajay Mishra, learned APP appearing on behalf of respondent State in Cr. Appeal (D.B.) No. 1085 of 2018 and Mr. Sujit Kumar Singh, learned APP representing the respondent State in Cr. Appeal (D.B.) No. 90 of 2018.

4. The facts leading to filing the present appeals are as under:

4.1. A written complaint was given by one Navin Kumar Singh to the Station House Officer, Sonbarsha Raj Police Station in which he has mainly stated that on 18.04.2015 (Saturday) at about 7:00 PM, when he reached near brick kiln, Manori of his elder brother Mani Prasad Singh, he heard his brother shouting near the brick kiln. When he reached near him running, he saw that three-four persons were brutally attacking him to kill him, whereafter he started shouting and upon hearing his shouts, Daulat Singh, Arvind Singh, Ajay Singh, Uday Singh and Amar Singh came to the place of occurrence and went near him (deceased) to save him. They saw that Sirajul Mian, Purunjeet Burman and Pawan Yadav and three-four unknown persons armed with knife, *Dabiya* and other sharp edged weapons were killing him. Thereafter, the assaulters fled away. Thereafter, when they lifted his elder bother, he was soaked with blood and fell unconscious. They tried to take him to hospital, but by then he died.

4.2. After receipt of the aforesaid written complaint, formal First Information Report (FIR) came to be registered on 19.04.2015 at about 7.30 AM. After registration of the FIR, the Investigating Officer (IO) carried out investigation and during the course of investigation, the IO collected the

evidence and recorded the statement of witnesses. Thereafter, he filed charge-sheet against the appellants-accused.

4.3. As the case was exclusively triable by the court of Sessions, the concerned Magistrate committed the case on 09.09.2015 under Section 209 of the Code to the concerned Sessions court.

4.4. Before the trial court, the prosecution has examined ten witnesses and also produced documentary evidence. Thereafter, further statement of the accused-appellants under Section 313 of the Code came to the recorded.

4.5. After conclusion of the trial, the trial court passed the impugned judgment and order of conviction and sentence against which the convicts have preferred present separate appeals.

5. Learned counsel for the appellants would mainly submit that there is delay in lodging the FIR. It has been pointed out by learned Advocate that, as per the case of the informant, incident took place at about 7:00 PM on 18.04.2015 for which written complaint was given after three hours though the police station is situated at a distance of 1½ km. from the place of occurrence. It is further submitted that in the written complaint itself, the informant has initially stated that he had seen three-four

persons giving blows to his brother, however, in the written complaint itself the informant has thereafter narrated that the present two appellants with one Sirajul Mian, with the help of three-four unknown persons, were giving blows with knife, *dabiya and* sharp-edged weapons and thereafter accused fled away from the place of occurrence. At this stage, learned counsel has referred the deposition given by the prosecution witnesses, including the informant, who is PW 10. It is contended that PW 10, the informant, has deposed in his examination-in-chief that there were only two persons who were giving blows with deadly weapons to his brother, i.e., one Sirajul Mian and appellant Pushanjit Burman. It is further submitted that informant, PW 10, has specifically stated during cross-examination that appellant-accused Pawan Yadav was not present at the place of occurrence, despite which the trial court has convicted the accused Pawan Yadav.

5.1. Learned counsel for the appellants thereafter contended that PW 3, PW 4 and PW 7 have not supported the case of the prosecution and they have turned hostile, whereas PWs 1, 2, 5 and 6 are hearsay witnesses. Learned counsel, therefore, contended that the case of the prosecution rests on the deposition of PW 9 and PW 10. However, both the aforesaid witnesses have specifically admitted during cross-examination that Pawan Yadav

was not present at the place of occurrence, despite which he has been convicted by the trial court.

5.2. Learned counsel thereafter contended that there are major contradictions and inconsistencies in the deposition of the prosecution witnesses, including PW 9 and PW 10, who are near relatives of the deceased and, therefore, their deposition cannot be relied upon. At this stage, it has been specifically pointed out by learned counsel that informant PW 10 has admitted in paragraph 5 of his cross-examination that he reached at the place of occurrence after 10-15 minutes. Learned counsel, therefore, contended that PW 10, the informant, is also not an eye-witness.

5.3. At this stage, learned counsel has referred the reasoning recorded by the trial court while convicting the present appellants. It is contended that, in the present case, IO has not been examined by the prosecution and because of the non-examination of the IO serious prejudice has been caused to the defence. It is contended that the trial court has observed that the appellant Pushanjit Burman as well as the absconding accused Sirajul Mian have voluntarily produced the weapons before the investigating agency and confessed their guilt before the IO. However, there is no evidence on record to suggest that the concerned accused have

confessed before the IO their guilt or they have produced the weapons before the IO. It is further submitted that even the so-called weapons were also not produced before the court during the course of trial.

5.4. Learned counsel, therefore, urged that the prosecution has failed to prove the case against the appellants beyond reasonable doubt and, in fact, the prosecution has failed to point out the motive on behalf of the appellants to commit the alleged offence. At this stage, learned counsel has referred the further statement of the accused appellants recorded under Section 313 of the Code and thereafter contended that the trial court has failed to put all the incriminating evidence before the accused while recording their statement under Section 313 of the Code. Learned counsel, therefore, urged that the trial court has committed grave error while passing the impugned judgment and order. Hence, the impugned judgment and order be quashed and set aside and both these appeals be allowed.

6. On the other hand, learned APP has vehemently opposed both the appeals. Learned APP would mainly contend that there are eyewitnesses to the occurrence in question. The informant, PW 10, as well as PW 9 are the eye-witnesses who have supported the case of the prosecution and specifically

deposed before the court about the role played by the present appellants. It is further submitted that PW 8, the Doctor who has conducted the *post mortem* of the dead body of the deceased, has also supported the case of the prosecution and more than nine injuries were found on the dead body of the deceased. Thus, the medical evidence supports the version of the eyewitnesses. Learned APP, therefore, urged that the prosecution has proved the case against the appellants beyond reasonable doubt and, therefore, the trial court has not committed any error while passing the impugned judgment and order. Learned APP, therefore, urged that both these appeals be dismissed.

7. We have considered the submissions canvassed by the learned counsel for the parties and perused the evidence led by the prosecution before the trial court. We have re-appreciated the entire evidence. It would emerge from the record that, as per the written report/complaint given by the informant-PW 10, the incident took place at about 7:00 PM on 18.04.2015, for which written complaint was given at about 10:00 PM, which was registered on 19.04.2015 at 7:30 AM. It is the specific case of the informant in the written complaint that he heard his brother shouting and rushed towards the said direction and at that time he saw that three-four persons were giving blows with weapons to his

brother. He, therefore, shouted and upon hearing his shouts, five persons, named in the written report, rushed to the place of occurrence and at that time they saw that one Sirajul Mian, Pushanjit Burman and Pawan Yadav, with the help of three-four unknown persons armed with deadly weapons like knife, *dabiya* were giving blows to his brother. Thereafter, all the accused fled away from the place of occurrence. Thus, from the aforesaid written complaint, it can be said that initially the informant had stated about three-four persons giving blows to his brother with sharp-edged weapons. However, immediately thereafter, he named three persons and alleged that the three named persons, including the present appellants, and three-four unknown persons were giving blows to his brother. It would further reveal from the evidence led by the prosecution that though the informant has named Arvind Kumar Singh who reached at the place of occurrence, the said witness, PW 1, has stated in his examination-in-chief that when he reached at the place of occurrence, he found his brother dead. Thus, it can be said that PW 1 is not an eye-witness and he subsequently reached to the place of occurrence.

7.1. PW 2, Daulat Kumar Singh, has though deposed in his examination-in-chief in paragraph 1 that at the time of incident wife of deceased called him on mobile phone and told

him that his elder brother (deceased) was in conflict with Pawan Yadav and though he never goes to the brick kiln at this hour, he has gone there, please go and verify, he immediately went to brick kiln on a vehicle, but none was there in the office. After parking the vehicle, when he moved forward, he heard some commotion and when he reached there, he found dead body of Mani Babu lying there having cut injuries and blood oozing out of it. There three-four persons Arvind Singh, Navin Singh Uday Singh and four-five labourers also reached there. Then Navin Singh (informant) told that Pushanjit Burman, Pawan Yadav and Md. Sirajul have killed his brother and fled away. He remained there for some time and thereafter returned back to his house. When he reached home, he came to know that Pawan Yadav has been apprehended by the Police near the place of occurrence. The said witness has admitted during cross-examination in paragraph 5 that when he reached at the place, he found dead body of Mani Singh. He has further admitted during cross-examination that police has recorded his statement after 5-6 days. It is also relevant to observe, at this stage, that PW 2 has specifically admitted in paragraph 15 that he had not seen anybody giving blow to Mani Singh. Further, in paragraph 17 of cross-examination, he had once again admitted that he reached at the place of occurrence after the incident took

place and after he reached at the place of occurrence, he found Mani Singh dead. Thus, we are of the view that PW 2 is not an eye-witness to the said occurrence.

7.2. PW 3 and PW 7 have not supported the case of the prosecution and they have turned hostile.

7.3. PW 4 has admitted in paragraph 2 that he is not aware about the occurrence and the said witness has signed on the seizure list.

7.4. PW 5 and PW 6 have also deposed that they have not seen the incident in question and PW 6 has specifically stated that he was not present at the said place. He came to know about the incident after 2-3 days. Thus, the aforesaid witnesses are hearsay witnesses.

7.5. PW 8, Dr. Akhileshwar Prasad, is the witness who has conducted the *post mortem* of the dead body of the deceased. The said witness has specifically stated before the court that he found following *ante mortem* injuries: -

> *"(a) a sharp-cut wound of about 4"x24"x4"x deep to viscera in the right iliac fossa,*
>
> *(b) a second sharp-cut wound of about 1/4"x4"x4"x deep to viscera in the right flank,*
>
> *(c) a third sharp-cut wound of about 1"x½"x deep to abdominal cavity in the right hypo chondrium,*

(d) a fourth sharp-cut wound of about 1"x½"x deep to the thoraxic cavity above the right coastal margin,

(e) a fifth sharp-cut wound of about 1"x½"x deep to the thoraxic cavity below right nipple,

(f) a sixth sharp-cut wound of about 2"x4"x1/6" on right mid axila,

(g) a seventh sharp-cut wound of about 1"x½"x1/6" lateral to left side of umlicus,

(h) an eighth sharp-cut wound of about 1"x½"x deep to thoraxic cavity just 2 ½" fight above the right nipple,

(i) a nineth sharp-cut wound of about 3"x1"x cut to the lower end of right humeras bone,

(j) a tenth sharp-cut wound of about 3"x1"x fracture of upper end of right upper limb,

(k) an eleventh sharp-cut wound of about 3"x1"x deep to pelvic cavity on right upper buttock,

(1) a twelfth sharp-cut wound of about 1"x½"x muscle deep into right mid fore arm,

(m) a thirteenth sharp-cut wound of about ½"x2"x muscle deep on left fore arm just above the wrist joint and

(n) a fourteenth sharp-cut wound of about 1"x½"x muscle deep below right knee joint."

7.6. PW 8 found following injuries during internal examination : -

"(a) On opening the skull, the brain was found conjusted.

(b) Upon opening the chest, right side of upper lobe, middle lobe and lower lobe of lung (right side) and incised and pleural cavity, all were full of blood. There was no defect detected in the heart.

(c) Upon opening the abdomen, it was found that the liver was incised and the peritorial cavity was full of blood and the viscera of right iliacfossa was incised.

The cause of death was haemoragic shock due to injuries to vital organs liver, lungs and viscera, resulting from the above quoted injuries."

7.7. PW 9, Uday Singh, has been projected as an eye-witness by the prosecution. The said witness has deposed in his examination-in-chief in paragraphs 1 and 2 that the incident took place at about 7:00 PM on 18.04.2015 when he was present at the house of Mani Singh (deceased). The wife of deceased said that Mani Singh has gone to the brick kiln. At that time Navin Singh arrived there. She said that something has happened at the brick-kiln, please go and verify. PW 9 along with Navin went to the brick kiln and searched for the deceased. Then they heard shouts. Navin and PW 9 rushed there when PW 9 saw that three-four persons were inflicting knife, *Dabiya* and *chhura* blows to Mani Singh. On seeing them, they started fleeing away. He

identified only two miscreants Md. Sirajul and Pushanjit Burman, not the rest. Upon *hulla* Daulat Singh, Arvind Singh etc. came. By the time they lifted him (deceased) he had died. However, during cross-examination in paragraph 5, PW 9 has specifically admitted that accused appellant Pawan Yadav was not present and he has not killed Mani Babu.

7.8. PW 10 Navin Kumar Singh is the informant, who is the brother of the deceased. The said witness has stated in his examination-in-chief in paragraph 1, 2 and 3 that the incident took place on 18.04.2015 at about 7:00 PM. When he went to the brick kiln from market, he heard the screams of his brother Mani Singh to save him. He saw two persons killing him. They were Sirajul Mian and Pushanjit Burman, who were carrying knife, *dabiya* and dagger. They stabbed his brother in the stomach, chest and thighs. PW 10 thereafter raised alarm upon which Daulat Singh, Arvind Singh, Uday Singh and Ajay Singh etc. came there, whereafter both the miscreants fled away. At that time, the deceased was alive, while on the way to Sonbarsha Hospital, he passed away. Thereafter, PW 10 went to the police station with the dead body of his brother and gave written application.

However, it is pertinent to note that PW 10 has admitted in paragraph 5 of his cross-examination that he reached at the

place of occurrence after 10-15 minutes. Further, he has admitted in paragraph 7 of his cross-examination that accused appellant Pawan Yadav was not present at the place of occurrence and he had not seen him.

8. From the aforesaid evidence led by the prosecution, it transpires that the prosecution has projected PWs. 9 and 10 as eye-witnesses, however, from the cross-examination of PW 10-informant, it is clear that he reached at the place of occurrence after 10-15 minutes and, therefore, he cannot be termed as an eye-witness. Further, both these witnesses, i.e., PWs. 9 and 10, have specifically admitted that Pawan Yadav was not present at the place of occurrence and he had not killed Mani Singh.

8.1. It is pertinent to observe, at this stage, that in the present case, the prosecution has failed to examine the IO who had conducted the investigation. It is the specific contention raised by learned counsel for the appellants that because of non-examination of the IO, serious prejudice has been caused to the defence. With a view to appreciate the aforesaid submission, we have gone through the reasoning recorded by the trial court while passing the impugned judgment and order. It is revealed from the observation (IX), (X), (A) {mentioned as (B)}, (B) and (C) made by the trial court that the trial court has placed reliance upon the

confession made by Sirajul Mian as well as Pushanjit Burman (appellant herein) before the IO and also placed reliance upon the production of weapon, i.e., knife and sickle by the aforesaid two accused. It is relevant to note that aforesaid weapons were not produced before the Court nor the IO, before whom the confession was made by the accused, was examined by the prosecution. Thus, in the facts and circumstances of the present case, it can be said that because of non-examination of the IO, prejudice has been caused to the defence. On what basis the trial court has made the observation with regard to the production of the weapons as well as confessional statement of the accused before the IO is not revealed from the evidence of the prosecution. It appears that the trial court has referred the case diary.

8.2. At this stage, we would like to refer the decision rendered by the Hon'ble Supreme Court in the case of ***Kamlakar Patil v. State of Maharashtra*****,** reported in **(2013) 6 SCC 417**, wherein the Hon'ble Supreme Court has observed in paragraph 18 as under: -

> *"**18.** Keeping in view the aforesaid position of law, the testimony of PW 1 has to be appreciated. He has admitted his signature in the FIR but has given the excuse that it was taken on a blank paper. The same could have been clarified by the investigating officer, but for some reason, the*

investigating officer has not been examined by the prosecution. It is an accepted principle that non-examination of the investigating officer is not fatal to the prosecution case. In Behari Prasad v. State of Bihar [(1996) 2 SCC 317 : 1996 SCC (Cri) 271] , this Court has stated that non-examination of the investigating officer is not fatal to the prosecution case, especially, when no prejudice is likely to be suffered by the accused. In Bahadur Naik v. State of Bihar [(2000) 9 SCC 153 : 2000 SCC (Cri) 1186] , it has been opined that when no material contradictions have been brought out, then non-examination of the investigating officer as a witness for the prosecution is of no consequence and under such circumstances, no prejudice is caused to the accused. It is worthy to note that neither the trial Judge nor the High Court has delved into the issue of non-examination of the investigating officer. On a perusal of the entire material brought on record, we find that no explanation has been offered. The present case is one where we are inclined to think so especially when the informant has stated that the signature was taken while he was in a drunken state, the panch witness had turned hostile and some of the evidence adduced in the court did not find place in the statement recorded under Section 161 of the Code. Thus, this Court in Arvind Singh v. State of Bihar [(2001) 6 SCC 407 : 2001 SCC (Cri) 1148], Rattanlal v. State of J&K [(2007) 13 SCC 18 : (2009) 2 SCC (Cri) 349] and Ravishwar

Manjhi v. State of Jharkhand [(2008) 16 SCC 561 : (2010) 4 SCC (Cri) 50], has explained certain circumstances where the examination of investigating officer becomes vital. We are disposed to think that the present case is one where the investigating officer should have been examined and his non-examination creates a lacuna in the case of the prosecution."

8.3. From the aforesaid decision rendered by the Hon'ble Supreme Court, it can be said that non-examination of the IO is not fatal to the prosecution's case when no prejudice is likely to be suffered by the accused. However, if the defence has suffered prejudice because of non-examination of the IO, it becomes fatal.

8.4. Keeping in view the aforesaid decision, if the evidence and the facts of the present case as discussed hereinabove are examined, we are of the view that, in the present case, because of non-examination of the IO, prejudice has been caused to the defence.

8.5. It would also reveal from the evidence led by the prosecution that prosecution has also failed to prove the motive on the part of the accused to kill the deceased.

8.6. As observed hereinabove, even the prosecution witnesses, i.e., PW 9 and PW 10 both have specifically admitted during cross-examination that Pawan Yadav was not present and he has not killed Mani Singh. Further, so-called confessional

statement was made by accused Sirajul Mian and Pushanjit Burman and not by Pawan Yadav. Even the weapons were produced, as per the observation of the trial court, by the two other accused and not Pawan Yadav, despite which Pawan Yadav has been convicted by the trial court.

8.7. We have also gone through the further statement of appellants recorded under Section 313 of the Code. The trial court has put following question to both the accused persons: -

"प्रश्न : क्या आपलोग गवाहों का बयान सुना है? (Have you herd the evidence of the witnesses)

उत्तर : हा (Yes)

प्रश्न : गवाहों का कहना है कि आपलोग दी. 18.04.2015 रोज शनिवार को संध्या 7.00 बजे गनौरी ईंट भट्टा चिमनी पर मणि प. सिंह को छुड, दतिया से हमला कर हत्या कर दिया? (It has been deposed by the witnesses that you people have killed Mani Prasad Singh by assaulting him with Chhura, Dabiya on 18.04.2015 (Saturday) at about 7.00 in the evening at Ganauri brick klin).

उत्तर: गलत है (It is false)

प्रश्न : सफाई में क्या कहना है (Do you have to say anything in defence)

उत्तर : मैं निर्दोष हूं" (I am innocent)

8.8. From the aforesaid, it can be said that the trial court has failed to put all the incriminating evidence led by the prosecution to the accused and because of the same, prejudice has been caused to the accused.

8.9 At this stage, we would like to refer to the decision rendered by the Hon'ble Supreme Court in the case of ***Raj Kumar @ Suman Vs. State (NCT of Delhi)***, rendered on 11.05.2023 in ***Cr. Appeal No. 1471 of 2023, arising out of S.L.P. (Cri.) No.11256 of 2018***, wherein the Hon'ble Supreme Court has observed in paragraph 13 to 16 as under:

> ***"13.*** *Then we come to the decision of this Court in the case of* ***S. Harnam Singh v. State (Delhi Admn.).*** *In paragraph 22, this Court held thus :*
>
> > ***"22.*** *Section 342 of the Code of Criminal Procedure, 1898, casts a duty on the court to put, at any enquiry or trial, questions to the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him.* ***It follows as a necessary corollary therefrom that each material circumstance appearing in evidence against the accused is required to be put to him specifically, distinctly and separately. Failure to do so amounts to a serious irregularity vitiating the trial if it is shown to have prejudiced the accused. If the***

irregularity does not, in fact, occasion a failure of justice, it is curable under Section 537, of the Code."

(emphasis added)

14. *Then we come to a decision in the case of* ***Samsul Haque*** *relied upon by the learned counsel for the appellant. In paragraphs 21 to 23, this Court held thus :*

*"**21.** The most vital aspect, in our view, and what drives the nail in the coffin in the case of the prosecution is the manner in which the court put the case to Accused 9, and the statement recorded under Section 313 CrPC. To say the least it is perfunctory.*

22. It is trite to say that, in view of the judgments referred to by the learned Senior Counsel, aforesaid, the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of audi alteram partem. *Apart from the judgments referred to aforesaid by the learned Senior Counsel, we may usefully refer to the judgment of this Court in Asraf Ali v. State of Assam [Asraf Ali v. State of Assam, (2008) 16 SCC 328 : (2010) 4 SCC (Cri) 278]. The relevant observations are in the following paragraphs : (SCC p. 334, paras 21-22)*

" 21. Section 313 of the Code casts a duty on the court to put in an enquiry or trial questions

to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

22. ***The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it.*** *Where no specific question has been put by the trial court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed a similar view in S. Harnam Singh v. State (Delhi Admn.) [S. Harnam Singh v. State (Delhi Admn.), (1976) 2 SCC 819 : 1976 SCC (Cri) 324] while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code).*

Non-indication of inculpatory material in its relevant facets by the trial court to the accused adds to the vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise."

23. *While making the aforesaid observations, this Court also referred to its earlier judgment of the three-judge Bench in Shivaji Sahabrao Bobade v. State of Maharashtra [Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033], which considered the fallout of the omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence, and the requirement that the accused's attention should be drawn to every inculpatory material so as to enable him to explain it. Ordinarily, in such a situation, such material as not put to the accused must be eschewed. No doubt, it is recognised, that where there is a perfunctory examination under Section 313 CrPC, the matter is capable of being remitted to the trial court, with the direction to retry from the stage at which the prosecution was closed [Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : 1973 SCC (Cri) 1033]."*

(emphasis added)

15. *Learned counsel for the respondent*

also relied upon a decision of this Court in the case of ***Vahitha v. State of Tamil Nadu****. This case does not deal with the consequences of the omission made while questioning the accused under Section 313 of CrPC. This deals only with a contingency where evidence of the prosecution witnesses goes unchallenged. Now we come to the decision of this Court in the case of* ***Satyavir Singh*** *relied upon by the learned counsel for the respondent. The decision holds that the challenge to the conviction based on non-compliance with Section 313 of CrPC for the first time in the appeal cannot be entertained unless the accused demonstrates that prejudice has been caused to him. If an objection is raised at the earliest, the defect can be cured by recording an additional statement of the concerned accused. The sum and substance of the said decision is that such a long delay can be a factor in deciding whether the trial is vitiated. Moreover, what is binding is the decision of the larger Bench in the case of* ***Shivaji Sahabrao Bobade****, which lays down that if there is prejudice caused to the accused resulting in failure of justice, the trial will vitiate.*

16. *The law consistently laid down by this Court can be summarized as under:*

(i) It is the duty of the Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctively and separately. The material circumstance means the circumstance or the

material on the basis of which the prosecution is seeking his conviction;

(ii) The object of examination of the accused under Section 313 is to enable the accused to explain any circumstance appearing against him in the evidence;

(iii) The Court must ordinarily eschew material circumstances not put to the accused from consideration while dealing with the case of the particular accused;

(iv) The failure to put material circumstances to the accused amounts to a serious irregularity. It will vitiate the trial if it is shown to have prejudiced the accused;

(v) If any irregularity in putting the material circumstance to the accused does not result in failure of justice, it becomes a curable defect. However, while deciding whether the defect can be cured, one of the considerations will be the passage of time from the date of the incident;

(vi) In case such irregularity is curable, even the appellate court can question the accused on the material circumstance which is not put to him; and

(vii) In a given case, the case can be remanded to the Trial Court from the stage of recording the supplementary statement of the concerned accused under Section 313 of CrPC.

(viii) While deciding the question whether prejudice has been caused to the accused because of the omission, the delay in raising the contention is only one of the several factors to be considered."

8.10. At this stage, we would also like to refer and rely upon the decision rendered by the Hon'ble Supreme Court in the case of ***Maheshwar Tigga Vs. State of Jharkhand***, reported in **(2020) 10 SCC 108**, wherein the Hon'ble Supreme Court has observed in paragraphs 7 and 8 as under:

"7. A bare perusal of the examination of the accused under Section 313 CrPC reveals it to be extremely casual and perfunctory in nature. Three capsuled questions only were asked to the appellant as follows which he denied:

"*Question 1*. There is a witness against you that when the informant V. Anshumala Tigga was going to school you were hiding near Tomra canal and after finding the informant in isolation you forced her to strip naked on knifepoint and raped her.

Question 2. After the rape when the informant ran to her home crying to inform her parents about the incident and when the parents of the informant came to you to inquire about the incident, you told them that "if I have committed rape then I will keep her as my wife".

> *Question 3*. On your instruction, the informant's parents performed the “Lota Paani” ceremony of the informant, in which the informant as well as your parents were present, also in the said ceremony your parents had gifted the informant a saree and a blouse and the informant's parents had also gifted you some clothes.”
>
> 8. It stands well settled that circumstances not put to an accused under Section 313 CrPC cannot be used against him, and must be excluded from consideration. In a criminal trial, the importance of the questions put to an accused are basic to the principles of natural justice as it provides him the opportunity not only to furnish his defence, but also to explain the incriminating circumstances against him. A probable defence raised by an accused is sufficient to rebut the accusation without the requirement of proof beyond reasonable doubt.”

8.11. From the aforesaid decision rendered by the Hon’ble Supreme Court, it can be said that it is the duty of the Trial Court to put each material circumstance appearing in the evidence against the accused specifically, distinctly and separately. The material circumstance means the circumstance or the material on the basis of which the prosecution is seeking his conviction. The object of examination of the accused under

Section 313 of the Code is to enable the accused to explain any circumstances appearing against them in the evidence. The failure to put material circumstances to the accused amounts to a serious irregularity and it will vitiate the trial if it is shown to have prejudiced the accused.

8.12. Keeping in view the aforesaid decision, once again, if the statement of the accused recorded under Section 313 of the Code is examined, we are of the view that the court has not put the incriminating circumstances to the accused, as a result of which prejudice has been caused to the appellants-accused as contended by learned counsel appearing for the appellants.

9. In view of the aforesaid facts and circumstances of the present case and the discussion made hereinabove, we are of the view that the prosecution has miserably failed to prove the case against the appellants beyond reasonable doubt, despite which the trial court has passed the impugned judgment and order of conviction and sentence. Hence, the same are required to be quashed and set aside.

10. Accordingly, both these appeals stand allowed.

11. The impugned judgment of conviction dated 13.12.2017 and the order of sentence dated 03.01.2018 rendered by learned Additional Sessions Judge-II, Saharsa, in Sessions Trial

No. 247 of 2015, arising out of Sonbarsa Raj P.S. Case No. 52 of 2015 (G.R. No. 940 of 2015) are quashed and set aside.

12. The appellant of Cr. Appeal (D.B.) No. 1085 of 2018, namely, Pushanjit Burman @ Prasenjit Burman @ Prasenjit Verma, is in custody. He is directed to be released from jail custody forthwith, if his presence is not required in any other case.

13. The appellant of Cr. Appeal (D.B.) No. 90 of 2018, namely, Pawan Yadav, is on bail. He is discharged from the liabilities of his bail-bonds.

(Vipul M. Pancholi, J)

(Dr. Anshuman, J)

Pawan/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	10.01.2025.
Transmission Date	10.01.2025.